

average weekly wage for an October 13, 1999 accident is \$430.63 as compared to \$605 per week if claimant sustained a series of micro-traumas after that date.

On page 3 of the March 14, 2002 Award, the Judge noted that respondent and its insurance carrier denied claimant's accident was continuing in nature. But the Judge did not address that specific issue. The Judge also did not address claimant's request for the payment of incurred or future medical expense. Accordingly, the Judge awarded claimant a 19.5 percent permanent partial general disability based upon a \$430.63 average weekly wage, which was claimant's average weekly wage on October 13, 1999.

In his brief to the Board, claimant contends the "date of accident is November 17, 2000 for the aggravations sustained from October 13, 1999 to July 2000 when he [was] relieved of work duties by Dr. MacMillan." Conversely, respondent and its insurance carrier contend the date of accident is October 13, 1999, and that claimant failed to prove that he sustained micro-traumas after that date. There is no dispute that claimant needs ongoing medical treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and the parties' arguments, the Board finds that the appropriate date of accident for this claim is October 13, 1999, and that claimant has failed to prove that he sustained a series of micro-traumas after that date. Accordingly, claimant's average weekly wage for purposes of computing his disability benefits is \$430.63.

Respondent is a department store. Claimant testified that on October 13, 1999, something unusual happened at work while he was setting up a new department and moving store fixtures. According to claimant, on that date he experienced a severe back pain running across his back down his buttock and into his leg. Claimant testified, in part:

Q. (Ms. Vetter) When you talked about your accident back in October of 1999, what were you doing when you first had the pain in your back? Are you sure you were at work?

A. (Claimant) Yes, ma'am, I'm sure I was at work.

Q. How do you know you were at work when you had the pain?

A. I felt it. I was reaching to put shelves up and carrying clothing and moving shelves.¹

¹ R.H. Trans. at 19.

Because his back felt so bad, claimant reported the symptoms to respondent the same day they began. Respondent promptly referred claimant for medical treatment. But claimant continued working for respondent performing his regular job duties.

In November 1999 respondent promoted claimant from a sales associate in the suit department into management. With the promotion and additional responsibilities, claimant's wages increased from \$430.63 to \$605 per week. According to claimant, his new job as an area sales manager required considerable lifting and continuous bending. Claimant testified his management position was more physically demanding as he moved everything from clothing to appliances, entertainment centers and TVs, weighing from 20 pounds into the hundreds of pounds.

Eventually, claimant came under treatment of Dr. Robert Beatty, who took claimant off work in July 2000. According to claimant, his symptoms continued to worsen until November 2000, when Dr. Beatty operated on his back for a herniated disc.

At claimant's attorney's request, in May 2001 board-certified orthopedic surgeon Dr. Edward J. Prostic examined and evaluated claimant. After examining claimant and reviewing claimant's pertinent medical records, the doctor noted the following history and conclusions in his May 22, 2001 report:

Mr. Roberts reports injury during the course of his employment as sales manager for Dillard's, October 13, 1999. He was moving fixtures when he developed pain about his upper and lower back. He reported his injury and was sent to Occupational Medicine Associates where he was seen by Dr. Patrick Walker. . . .

. . . .

On or about Oct. 13, 1999, James D. Roberts sustained injury to his low back with recurrent herniation of lumbar disc. Surgery has been required. He continues with mechanical low back pain and has more stiffness than previously. He needs to continue on the restrictions imposed by Dr. Beatty. He has received an additional 12 percent permanent partial impairment of the body as a whole from the 1999 accident. He should anticipate recurrent episodes of back and/or leg pain for which he will require anti-inflammatory medicines by mouth and perhaps physical therapy.

When Dr. Prostic testified by deposition, the doctor repeated the above history and conclusions. But Dr. Prostic was not asked whether he believed claimant sustained a series of micro-traumas to his back following the October 1999 incident. Moreover, Dr. Prostic was the only expert medical witness to testify or otherwise provide a medical opinion in this claim regarding claimant's back. Dr. Lawrence E. Koppers also testified in this claim but his opinions were limited to claimant's diabetes.

In January 2001, claimant filed his application for hearing with the Division of Workers Compensation. In that document, claimant alleged a date of accident of "October 1999" and that the cause of the accident was "handling inventory." Later, in August 2001, claimant filed an amended application alleging a date of accident of October 13, 1999, to November 16, 2000.

When considering the entire record, the Board finds that on October 13, 1999, claimant injured his back working for respondent. But claimant has failed to prove that he sustained a series of micro-traumas to his back following October 13, 1999. Claimant argues that it is evident that he continued to injure his back at work following October 13, 1999, because he had increased symptoms. But claimant also testified that his symptoms continued to worsen after he left work in July 2000 until Dr. Beatty operated in November 2000. Consequently, the mere increase in symptoms does not establish that it is more probably true than not claimant was sustaining a series of micro-traumas or whether the increased symptoms were the result of the natural progression of the initial injury. The history that claimant gave Dr. Prostic and that doctor's conclusions point to an October 13, 1999 accident.

The Board concludes that October 13, 1999, is the appropriate date of accident for this claim and, therefore, claimant's average weekly wage for purposes of this claim is \$430.63.

As indicated above, the parties stipulated that claimant has sustained a 19.5 percent whole body functional impairment due to the back injury that he sustained while working for respondent, coupled with the diabetes that he developed as a direct result of the injections that he received for his back. Claimant must now take daily medications for his diabetes. And Dr. Prostic's testimony is uncontradicted that claimant should expect recurrent episodes of back and/or leg pain for which he will require medications and physical therapy. Accordingly, the parties agree that claimant is entitled to payment of all reasonable and related past medical expenses as well as ongoing medical benefits. Therefore, the March 14, 2002 Award should be modified in that respect.

AWARD

WHEREFORE, the Board modifies the March 14, 2002 Award to grant claimant payment of all reasonable and related past medical expenses as well as ongoing medical benefits. The remainder of the Award is affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
 John M. Graham, Jr., Attorney for Respondent and its Insurance Carrier
 Robert H. Foerschler, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director